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# In the Supreme Court of the United States

OCTOBER TERM, 1933

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No. 656

WILBUR F. BOOTH

*v.*

THE UNITED STATES

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No. 657

CHARLES F. AMIDON

*v.*

THE UNITED STATES

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*ON CERTIFICATES FROM THE COURT OF CLAIMS*

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The Court of Claims rendered no opinions.

### JURISDICTION

The certificates of the Court of Claims were filed December 14, 1933. The jurisdiction of this Court rests on Section 3 (a) of the Act of February 13, 1925.

## QUESTIONS PRESENTED

The questions certified in the two cases are identical and read as follows:

1. Does a United States district or circuit judge who, having served continuously for ten years and attained the age of seventy years, does not resign but retires under the provisions of Section 260 of the Judicial Code, as amended, continue in office within the meaning of Section 1 of Article III of the Constitution which forbids diminution of the compensation of judges during their continuance in office?

2. Where the salary of a United States district or circuit judge is increased by law after his appointment and he has subsequently retired in full compliance with the provisions of Section 260 of the Judicial Code, as amended; is a reduction of his compensation as a retired judge to an amount not below that fixed by law as his salary at the time of his appointment a diminution of his compensation within the meaning of Section 1 of Article III of the Constitution?

## STATUTES INVOLVED

The statutes involved are set forth in the Appendix (*infra*, pp. 27–29).

## STATEMENT

The facts as disclosed by the certificates may be summarized as follows (No. 656, R. 1–3; No. 657, R. 1–3):

*No. 656.*—Wilbur F. Booth was appointed United States Circuit Judge for the Eighth Judicial Circuit on March 18, 1925, and qualified on March 27, 1925 (R. 1). For many years prior to and up to the time of such appointment he had held the office of Judge of the United States District Court for the District of Minnesota and by November 28, 1931, had served continuously as district or circuit judge for more than seventeen years (R. 1–2). On January 1, 1932, having attained the age of seventy, he retired pursuant to the provisions of Section 260 of the Judicial Code as amended by the Act of February 25, 1919 (R. 1, 2). Ever since his retirement he has continued to perform the duties of retired United States Circuit Judge in the manner provided by law and has participated in the hearing and decision of many cases pending in the Circuit Court of Appeals for the Eighth Circuit (R. 2).

At the time of the plaintiff's appointment as circuit judge the annual compensation of circuit judges was fixed by law at $8,500 per annum. It was increased to $12,500 per annum by the Act of December 13, 1926, c. 6, Section 1, 44 Stat. 919, and stood at that figure when he retired (R. 2). By Section 13 of the Independent Offices Appropriation Act of June 16, 1933 (Public No. 78), the retired pay of judges whose compensation prior to retirement or resignation could not under the Constitution have been diminished was reduced by 15%. Pursuant to that Act the plaintiff was paid

during the period from June 15, 1933, to October 31, 1933, at the rate of $10,625 per annum. The amount withheld from him during that time was $697.93 (R. 2). The plaintiff duly protested against this reduction and brought suit in the Court of Claims alleging that the Act of June 16, 1933, violates the constitutional provision that the compensation of Federal judges shall not be diminished during their continuance in office. The Government demurred to the petition.

*No. 657.*—Charles F. Amidon was appointed Judge of the United States District Court for the District of North Dakota on February 18, 1897, and qualified on February 27, 1897 (R. 1). From February 27, 1897, until June 2, 1928, he served continuously in that office (R. 1). On June 2, 1928, having attained the age of seventy years, he retired pursuant to Section 260 of the Judicial Code as amended by the Act of February 25, 1919 (R. 1). Ever since his retirement he has continued to perform the duties of a retired United States District Judge in the manner provided by law and has, as conditions have permitted and the business of the court demanded, performed judicial acts in that capacity (R. 2).

At the date of the plaintiff's appointment the salary of the United States District Judge was fixed by law at the rate of $5,000 per annum. It has been increased from time to time, and at the date of the plaintiff's retirement was at the rate of $10,000 per annum.

Pursuant to Section 13 of the Independent Offices Appropriation Act, *supra*, the plaintiff received during the period from June 15, 1933, to October 31, 1933, compensation at the rate of $8,500 per annum. He duly protested against the reduction and brought suit in the Court of Claims to recover the sum of $558.34, being the amount withheld during the period above mentioned (R. 2). The Government demurred to the petition.

## SUMMARY OF ARGUMENT

### I

The Constitution requires only that the compensation of a judge shall not be diminished during his "continuance in office." We submit that a judge who has availed himself of the retirement provisions of Section 260 of the Judicial Code as amended does not continue in office within the meaning of the Constitution. Although the statute authorizes a retired judge to perform judicial duties if called upon and willing to do so, he is under no duty to render any services whatever. The duty of performing judicial functions is an integral part of the office of judge, and the salary to which a judge is entitled, and which may not be diminished, is the salary which he receives in consideration of the performance of that duty. The Constitution specifies that judges shall receive compensation "for their Services," and it must have been contemplated that so long as a judge remained

"in office" he would render the services which it is the duty of a judge to render. We submit that the salary of a retired judge is not paid for services rendered, but is in the nature of a pension.

The retirement provisions of Section 260 of the Judicial Code indicate clearly the understanding and intent of Congress that a retired judge is not to be regarded as continuing in office. That section provides for the appointment of a "successor" to fill the vacancy caused by the retirement. These provisions are in striking contrast to those in the same Act authorizing the President to appoint an "additional" judge when a judge who is eligible for retirement and unable to discharge efficiently all the duties of his office "shall nevertheless remain in office, and not resign or retire." In such a case there is no vacancy until the death, resignation or retirement of the disabled judge, and the Act provides that when such vacancy occurs it shall not be filled. If a judge does not resign or retire, he "remains in office" in the language of the Act. If he resigns or retires, he no longer remains or continues in office. The office is filled by the successor, who assumes the duties formerly discharged by the retired judge.

It is for Congress to determine the fiscal policies of the Government, provided it violates no constitutional principles. The prohibitions contained in the Third Article were designed to protect the judiciary as a whole. But the attempted reduction

of the salaries of retired judges does not concern the judiciary as a whole. It must, moreover, be regarded as a legislative interpretation of the effect of the retirement act.

II

If the first question is answered in the negative, it will not be necessary to answer the second question. If, however, the first question is answered in the affirmative, then we think the second should be answered in the affirmative also. No Federal court has had occasion to decide whether a diminution which does not reduce the compensation below the amount fixed by law at the date of the judge's appointment is within the prohibition of Article III. Decisions of two state courts, however, support the plaintiff's contention in this regard, and we believe those decisions to be sound.

ARGUMENT

I

RETIRED JUDGES DO NOT CONTINUE IN OFFICE WITHIN THE MEANING OF THE THIRD ARTICLE OF THE CONSTITUTION

The constitutional prohibition against diminution of the compensation of Federal judges is limited in terms to the compensation which such judges are entitled to receive during their continuance in office. The first question certified by the court below presents the issue whether a judge who retires pursuant to Section 260 of the Judicial

Code, as amended (*infra*, p 27), continues "in office" within the meaning of that prohibition.

Prior to 1869 there was no provision for the payment of salaries or pensions to judges after resignation. In that year Congress, for the first time, provided that any Federal judge who had attained the age of seventy and had served for ten years or more might resign upon the salary payable to him at the time of resignation. Act of April 10, 1869, c. 22, sec. 5, 16 Stat. 44, 45. Under that Act a judge who was eligible for resignation could either remain in office, retaining all the powers and duties incident thereto, or relinquish such powers and duties and cease to be a judge.

In 1919 a new plan was devised, whereby a Federal judge, other than a Justice of this Court, who has attained the age of seventy and has served for ten years or more, may "retire, upon the salary of which he is then in receipt" from regular active service on the bench. (Section 260 of the Judicial Code, as amended by the Act of February 25, 1919, *infra*, p. 27.) A judge so retiring is under no obligation to perform any judicial duties whatever. He may, however, be called upon and "authorized" to perform such judicial duties as he may be willing to undertake. Whether or not he renders any service, yet he receives his former salary, not as compensation for services rendered, but as a pension for past services, just as though he had resigned. It is with the status of such retired judges in re-

spect of the constitutional guaranty against reduction of salary that these cases are concerned.

The words of the Constitution are, as this Court has frequently held, to be taken in their ordinary, natural sense. *The Pocket Veto Case,* 279 U.S. 655, 679; *United States* v. *Sprague,* 282 U.S. 716, 731. The word "office" has been defined in a number of cases, of which we shall mention only a few. In *Metcalf & Eddy* v. *Mitchell,* 269 U.S. 514, this Court, adopting the definition given in *United States* v. *Hartwell,* 6 Wall. 385, said (p. 520):

> An office is a public station conferred by the appointment of government. The term embraces the idea of tenure, duration, emolument and duties fixed by law.

Chief Justice Marshall said, in *United States* v. *Maurice,* 26 Fed. Cas. No. 15747:

> An office is defined to be "a public charge or employment," and he who performs the duties of the office, is an officer.

The same thought was expressed in a somewhat amplified form in *Clark* v. *Stanley,* 66 N.C. 59, 63:

> A public office is an agency for the State, and the person whose duty it is to perform this agency is a public officer. This, we consider to be the true definition of a public officer in its original broad sense. The essence of it is, the duty of performing an agency, that is, of doing some act or acts, or series of acts for the State.

The following quotation appearing in *Bradford* v. *Justices of Inferior Court,* 33 Ga. 332, 336, adverts to the etymology of the word:

> * * * "It is said that the word *officium* principally implies a duty, and in the next place the charge of such duty; and that it is a rule, that where one man hath to do with another's affairs against his will and without his leave, that it is an office, and he who is in it is an officer." Carth. 478, 4 Jacob's Law Dic. 433. * * *

In *Throop* v. *Langdon,* 40 Mich. 673, 682, the court, speaking through Judge Cooley, said:

> An office is a special trust or charge created by competent authority. If not merely honorary, certain duties will be connected with it, the performance of which will be the consideration for its being conferred upon a particular individual, who for the time will be the officer.

See also: *Reed* v. *Schon,* 2 Cal. App. 55; *State* v. *Griswold,* 73 Conn. 95, 97; *United States* v. *Trice,* 30 Fed. 490, 494 (W.D. Tenn.); *State Prison of North Carolina* v. *Day,* 124 N.C. 362, 368.

These quotations make it clear that the term "office" implies an obligation to render services—to perform the duties incident to the position. Indeed, it is difficult to conceive of an office to which no duties are attached. As was said in *Commonwealth* v. *Gamble,* 62 Pa. St. 343, 349:

> It seems like a solecism to regard that to be an office in this country, to which there

> are no duties assigned. "An office", says Kent, vol. 3, p. 454, "consists in a right and correspondent duty to execute a public or private trust, and to take the emoluments." To the same effect are Cruise's Dig. vol. 3, p. 117, and Bouv. Law Dict. *Verbum* "Office."
>
> * * * It seems to me that it could not be maintained for a moment, therefore, that a president judgeship, created without any duties to be performed, or authority to be exercised, would not be an office in the sense of the Constitution, or at common law, as applicable to this country; if so, by parity of reason, it would cease to be such if its duties and authorities are all taken away. * * *

Consequently, we submit, it is only reasonable to suppose that the framers of the Constitution contemplated that the office to which reference is made in the Third Article would comprise duties as well as powers and privileges.

While the Constitution defines the powers of the Federal judiciary, it does not prescribe in detail the duties. Those duties are, in the main, to be found in the nature of the office as it grew up under the common law. Some of the duties, however, are defined by statute. Thus, district judges are required to hold court regularly at stated places in their respective districts. (Judicial Code, Secs. 70–115, as amended; U.S.C., Title 28, Secs. 142–196.) And it is "the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time

according to law." (Judicial Code, Sec. 118, as amended; U.S.C., Title 28, Sec. 213.) These duties, we submit, although defined by statute as to the time and place of performance, are an integral part of the constitutional office of judge. For refusal to hold court as required by law a judge may be impeached.[1] Yet a retired judge is, by the terms of the statutes under which he retires, relieved of all obligations to render service and need never act in a judicial capacity unless he feels disposed to do so.

The word "office" appears in both the tenure of office provision and the provision relating to compensation. It must be presumed to have the same meaning in both places. "Tenure of office during good behavior imports not only the length of the term but also the extent of service." *Opinion of the Justices,* 271 Mass. 575, 580. Congress, therefore, may not compel a judge to retire to part-time service against his will, because to do so would be to deprive him of one of the essential elements of office. It would seem to follow that if a judge voluntarily retires from regular, active service, he does not continue in office within the meaning of the Constitution.

It is argued that unless a retired judge remains "in office" he is necessarily without power to ex-

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[1] See impeachment of District Judge Humphreys, Cong. Globe, 37th Cong., 2d Sess. pp. 2942–2953, and particularly Article 5 of the Articles of Impeachment, appearing at p. 2950.

ercise judicial authority, and that conversely, if he has the right to perform judicial duties, as Congress intended he should, it must follow that he remains in office within the meaning of the Third Article. Since the word "office" is obviously used by counsel for the plaintiffs with respect to the compensation provision, the argument comes down to this—that the right to receive undiminishable compensation is necessarily and under all circumstances coextensive with the privilege to perform judicial duties. Stated another way, the contention is that a judge cannot relinquish the right to a protected salary and at the same time have the right, if called upon, to perform judicial duties. We submit that nothing in the Constitution compels this conclusion.

The purpose of the tenure of office and compensation provisions was to prevent the involuntary removal of a judge during good behavior or the diminution of his salary while he continues in office. It is doubtful whether the framers of the Constitution envisaged the somewhat anomalous situation of a judge being in office in the sense that he retains the power to act in a judicial capacity and at the same time being relieved of the duties and obligations incident to the office of judge. Nevertheless, while Congress may not deprive a judge of the judicial powers and privileges against his will, there is no constitutional prohibition upon its permitting him to retire from active service of his own volition. The only question is

whether, having availed himself of the privilege extended to him, a judge may still claim the benefits and immunities conferred by Article III.

The language of the Constitution should be interpreted "in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used." *Popovici* v. *Agler,* 280 U.S. 379, 383. While the framers of that instrument were vitally interested in safeguarding the salaries of Federal judges, they undoubtedly assumed that so long as a judge remained "in office" he would perform all the duties attached to the position, and that when he found himself no longer able to perform those duties efficiently he would resign and cease to be a judge. The Third Article provides that judges shall receive "for their Services" a compensation which shall be paid at stated intervals and shall not be diminished. It cannot have been intended that this compensation was to be paid for services to be rendered at will. By accepting the office a judge obligates himself to discharge all the duties of the office. The word "Services" must mean the services commonly rendered by a judge—those which it is his duty to render. Thus, although the amount of compensation or salary does not depend upon the *quantum* of service, which may vary from time to time and from place to place, it was beyond reasonable doubt intended as consideration for performance of those duties which a judge is under obligation to perform. Cf. *Benedict* v. *United States,* 176 U.S. 357, 360.

We think it self-evident that Section 1 of the Third Article, providing that judges shall receive at stated times compensation for their services, has no application to a judge who has retired from office and whose successor has been appointed and is now the incumbent of the office, receiving its emoluments in consideration of the performance of the duties of the office. The retired judge is not paid for services rendered, for he is relieved by the retirement statute from the obligation to perform all or any of the duties which he was required to perform when he held the office. He receives his former salary irrespective of the rendition of any service. If called upon to perform judicial duties he has the right to decline to act, and his pay in no sense whatever can be termed compensation for services, because he may perform no services and by statute is expressly relieved from the performance of the regular active duties of the office. These regular active duties embrace all the duties of the office. A judge has no inactive, irregular duties. Upon assuming office he is required to take the following oath (Judicial Code, Sec. 257; U.S.C., Title 28, Sec. 372):

> I, ---------- ----------, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ---------- according to the best of my

abilities and understanding, agreeably to the Constitution and laws of the United States: So help me God.

The successor to the retired judge takes the same oath and is required to perform all the duties of the office to which he succeeds. The inherent unsoundness of the position of the plaintiffs is shown by the following statement on p. 12 of their brief: "Even an active judge is under no more than a moral obligation to perform all of the judicial duties which his health permits and the business of his court demands." It is, we submit, palpably unsound to say that the duty devolving upon a judge, who has accepted office and taken an oath faithfully to discharge and perform all the duties incumbent upon him as judge according to the best of his abilities, is the same or in any way analogous to the obligation of a retired judge who has been relieved of the performance of the duties which he was required to perform prior to his retirement. The one is under the obligation imposed by the Constitution and the statutes, supplemented by his oath of office, to perform all the duties of a judge, while the other in retiring is expressly relieved of the obligation to perform the duties which appertained to the office from which he retired.

Since a retired judge is under no obligation other than that imposed by conscience, his salary cannot be regarded as compensation in the usual sense. We submit, despite the statements quoted by the plaintiffs from the debates in Congress (Brief, pp.

13–14), that in reality retired pay is more analogous to a pension than to the compensation of a judge in regular active service. Such retired pay is not given by way of consideration for the discharge of duties *in praesenti,* but rather in recognition of services rendered in the past. Consequently, we submit it is not the kind of compensation which the Third Article was designed to protect.

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The Act of February 25, 1919, amending Section 260 of the Judicial Code, discloses on its face the understanding and intent of Congress that a judge who avails himself of the privilege of retiring does not continue in the office which he previously held. Upon retirement he is relieved of all the obligations of the office and has no further duties to perform except such as he may be willing to undertake. The provision that the President shall appoint a "successor" shows that the retirement creates a vacancy which must be filled. Since the new judge is a successor to the old one, there was no need to make provision for or against the appointment of another judge upon the death or resignation of the one who has retired for there is then no vacancy to be filled, the vacancy having occurred when the retirement took place. These provisions are in striking contrast to those authorizing the appointment of an additional judge when a judge who is eligible for retirement and unable to discharge efficiently all the duties of his

office "shall nevertheless remain in office and not resign or retire." In such a case the new judge is in no sense a "successor." He cannot succeed to an office which is still occupied. A vacancy does not occur until the death, resignation, or retirement of the disabled judge, but the Act recognizes that there is a vacancy at that time and expressly provides that when such vacancy occurs it shall not be filled. Thus, in the one instance the original office is filled by a new judge, whereas in the other a distinctly new office is created and an additional judge appointed who fills the new office.

The statement in plaintiff's brief (p. 10) that it "is a self-evident proposition" that the retired judges continue in office, is, we submit, in conflict with the very terms of the retirement statute. The statute provides that the "vacancy" caused by the death, resignation or *retirement* of a judge, shall not be filled when the President has appointed an additional judge, upon a finding that the judge was disabled.

So Congress has said that the retirement of a judge creates a vacancy. This means that the retired judge has vacated the office. Not only did Congress so declare, but it provided that when a judge retired his "successor" should be appointed to the vacancy thereby created. There could, of course, be no successor to a person holding an office, until that person had vacated the office.

The statute further provides that if a judge is disabled, but "shall nevertheless remain in office

and not resign or retire," the President in that event cannot appoint a successor to the disabled judge because he remains in office and will not retire, but he is authorized to appoint "an additional" judge, and if later the disabled judge retires and thereby creates a vacancy, Congress prohibits the President from filling the vacancy, as the additional judge already appointed is sufficient.

The word "successor" is a word of fixed meaning. "According to all the lexicographers, a successor is merely one who succeeds or takes the place of another." *State* v. *Andrews,* 64 Kan. 474, 496; 60 Corpus Juris 985. A successor is a "person who has been elected or appointed to some office after another person." Bouvier's Law Dictionary (Rawle's 3d rev.), Vol. 3, p. 3176. A successor is "one who has been appointed or elected to hold an office after the term of the present incumbent." Black's Law Dictionary (2d ed.), p. 1119.

We submit that it is evident that the judge who retires does not continue in the office from which he retires for the following reasons: First, a successor is appointed who succeeds to the office the retired judge held—and it will not be contended that there may be two incumbents of one office. Second, prior to retirement, the judge was bound to perform all the duties of the judgeship—bound by fixed principles and by his oath of office wherein he swore faithfully to discharge and perform all the duties incumbent upon him. After his retirement, he is relieved of the obligation to perform these

duties, and upon the appointment and qualification of his successor, the performance of all the duties of the office devolves upon him. Third, by the terms of the statute his retirement creates a vacancy, and it is impossible for one to continue in office after he has vacated the office. Fourth, the judge who succeeds the retired judge is nominated by the President as the "successor" of the retired judge, and he in fact takes the place and office formerly held by the retired judge. His appointment and commission in no way limit his powers or duties. His duties, power, and authority are just the same as those of every other active District or Circuit Court of Appeals judge, as the case may be. These are in no respect different from what they would be had the retired judge resigned instead of retiring.

In the case of *People* v. *Duane*, 121 N.Y. 367, 373, the court, discussing the question of the status of a retired Army officer, said:

> The statute evidently contemplated the vacation of the office by retiring army officers, and in terms produces such vacancy as completely as in cases of death or resignation. It provides that "the vacancies consequent upon such retirement" shall be filled by promoting to the place of the officer retired the next in rank, according to the established rules of the service. There was, of course, no vacancy to fill and no one could be promoted to the defendant's place, as an officer, so long as he himself held the office.

When Judge Booth retired, the President nominated John B. Sanborn "to succeed Wilbur F. Booth, retired," and Judge Sanborn was commissioned on January 23, 1932. No one was appointed to succeed Judge Amidon for the reason that on June 25, 1921, Congress had passed an Act (Act of June 25, 1921, c. 29, 42 Stat. 66) authorizing and instructing the President to appoint an "additional judge" for the District of North Dakota, such additional judge to be "held and treated as the senior judge" and to "exercise such powers and perform such duties in that judicial district as may be incident to seniority." See H.Rep. No. 130, 67th Cong., 1st Sess.[2] Pursuant to that Act, Judge Miller was appointed as an additional judge for the District of North Dakota on February 2, 1922. Section 2 of the Act provided:

> That whenever a vacancy shall occur in the office of the district judge for the district of North Dakota, by the retirement, disqualification, or death of the judge senior in commission, such vacancy shall not be filled, and thereafter there shall be but one district judge in said district.

Accordingly, when Judge Amidon retired, the "vacancy" caused by his retirement was not filled, and in the words of the statute there is now "but one

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[2] Judge Amidon did not reach the age of seventy until August 1926, and was therefore unable to take advantage of Section 260 of the Judicial Code prior to that date.

district judge in said district" of North Dakota and that District Judge is Judge Miller.

The effect of the retirement provisions has been considered in only two cases, neither of which, we submit, has any direct bearing upon the question here involved. In *Maxwell* v. *United States,* 3 F. (2d) 906 (C.C.A. 4th), a suit brought by the Government for breach of contract, the argument was made that the district judge who had retired from regular, active service had not been properly requested and authorized to act. The Circuit Court of Appeals held that a retired district judge may hold court in his own district without specific request or authorization by anyone. This Court affirmed the decision *per curiam,* citing only authorities dealing with the contract question involved. 271 U.S. 647.

In *McDonough* v. *United States,* 1 F. (2d) 147 (C.C.A. 9th), the defendant was convicted of a violation of the National Prohibition Act. The Circuit Court of Appeals affirmed the decision of the trial court and thereafter the defendant moved for a rehearing and later filed a supplemental petition for rehearing on the ground that one of the judges of the Circuit Court of Appeals had retired and had not been duly requested and authorized to participate in the case. This question had not been raised in the trial court or at the original hearing before the Circuit Court of Appeals. The

court stated that the defendant conceded that the retired judge had not relinquished his power to perform the duties of circuit judge when called upon to do so, and held that the contention that he had not been properly called upon was without merit. The petitioner then filed a petition for certiorari, contending for the first time that a retired judge is without authority to act in a judicial capacity under any circumstances. The petition was denied. 266 U.S. 613.

It seems hardly necessary to state that as lawyers and officers of this Court we are perhaps as much concerned with maintaining the independence of the judiciary as are the plaintiffs themselves. On the other hand, it is the declared policy of Congress in the present emergency to reduce the expenses of government. Since it is for Congress to determine the means to this end, provided only it does not transcend the authority conferred upon it by the Constitution, we conceive it to be our duty to advance the arguments which tend to show that the challenged statute is valid. Section 13 of the Act of June 16, 1933 (*infra*, p. 29), is clear and unambiguous. It was unquestionably designed to reduce the salaries of the plaintiffs and all other Federal judges who have retired from regular, active service. It must be regarded as reflecting the considered opinion of Congress as to the effect of retirement and of the provisions of Section 260 of

the Judicial Code which authorize retirement, for it is not to be presumed that Congress was ignorant of the fact that so long as a judge remains in office his compensation may not be reduced.

The limitations upon the power of Congress appearing in Section 1 of Article III were designed to protect the judiciary as a whole rather than to benefit any individual member or members thereof. *Evans* v. *Gore,* 253 U.S. 245, 253. But the validity of the statute under attack does not affect the judiciary as a whole in the slightest degree, either directly or indirectly, unless it may be said that men would be deterred from accepting judgeships in the absence of a guaranty of the privilege of retiring at full salary. Perhaps the inducement to accept positions on the Federal bench would have been greater had the framers of the Constitution seen fit to assure judges that their compensation would continue after resignation or retirement from active service. The fact remains, however, that this was not done and the omission has not led to serious difficulties in securing the services of men of character and ability. As we have pointed out, for more than eighty years after the ratification of the Constitution, there was no provision for the payment of pensions to resigned judges, and even at the present time the privilege of retirement is not open to Justices of this Court.

## II

### A DIMINUTION AFTER AN INCREASE IN COMPENSATION, EVEN THOUGH THE COMPENSATION IS NOT REDUCED BELOW THE AMOUNT FIXED BY LAW AT THE DATE OF THE JUDGE'S APPOINTMENT, WOULD SEEM TO BE CONTRARY TO THE INTENT OF THE THIRD ARTICLE OF THE CONSTITUTION

The second question certified by the court below is whether the Third Article prohibits the diminution of the compensation of judges, even though such diminution does not reduce the compensation below the amount fixed by law at the date of the judge's appointment. If the first question is answered in the negative, it will not be necessary for the court to answer the second question. If, however, the answer to the first question is in the affirmative, we think the second question should also be answered in the affirmative.

Although this question has never been directly passed upon by this or any other Federal court, it has been latent in two cases which this Court has decided. In *James* v. *United States,* 202 U.S. 401, the point was discussed in the petitioner's brief but was not contested by the Government. The decision turned wholly on the construction of the statute there involved. See also *Evans* v. *Gore,* 253 U.S. 245, *supra.* Well-reasoned opinions of the highest courts of two of the States take the view that the compensation fixed by the legislature

from time to time becomes the compensation which the judges are constitutionally entitled to receive and which may not be diminished during their continuance in office. *Long* v. *Watts,* 183 N.C. 99; *Commonwealth ex rel. Hepburn* v. *Mann,* 5 W. & S. (Pa.) 403. See also *City of New Orleans* v. *Lea,* 14 La. Ann. 197. We think this view is sound and that if a retired judge continues in office so that his compensation cannot be diminished, he is entitled to be paid the salary which he received at the time of his retirement.

### CONCLUSION

The first question certified should be answered in the negative. If, however, it is answered in the affirmative, then we think the second question should be answered in the affirmative also.

Respectfully submitted.

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JANUARY 1934.

# APPENDIX

Section 260 of the Judicial Code as amended by Section 6 of the Act of February 25, 1919, c. 29, 40 Stat. 1156, 1157, and by the Act of March 1, 1929, c. 419, 45 Stat. 1422 (U.S.C.Sup. VI, Title 28, Sec. 375), provides:

> SEC. 260. When any judge of any court of the United States, appointed to hold his office during good behavior, resigns his office after having held a commission or commissions as judge of any such court or courts at least ten years continuously or otherwise, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the salary which is payable at the time of his resignation for the office that he held at the time of his resignation. But, instead of resigning, any judge other than a justice of the Supreme Court, who is qualified to resign under the foregoing provisions, may retire, upon the salary of which he is then in receipt, from regular active service on the bench, and the President shall thereupon be authorized to appoint a successor; but a judge so retiring may nevertheless be called upon by the senior circuit judge of that circuit and be by him authorized to perform such judicial duties in such circuit as such retired judge may be willing to undertake, or he may be called upon by the Chief Justice and be by him authorized to perform such judicial duties in any other circuit as such retired judge may be willing to under-

take or he may be called upon either by the presiding judge or senior judge of any other such court and be by him authorized to perform such judicial duties in such court as such retired judge may be willing to undertake.

In the event any circuit judge, or district judge, having so held a commission or commissions at least ten years, continuously or otherwise, and having attained the age of seventy years as aforesaid, shall nevertheless remain in office, and not resign or retire as aforesaid, the President, if he finds any such judge is unable to discharge efficiently all the duties of his office by reason of mental or physical disability of permanent character, may, when necessary for the efficient dispatch of business, appoint, by and with the advice and consent of the Senate, an additional circuit judge of the circuit or district judge of the district to which such disabled judge belongs. And the judge so retiring voluntarily, or whose mental or physical condition caused the President to appoint an additional judge, shall be held and treated as if junior in commission to the remaining judges of said court, who shall, in the order of the seniority of their respective commissions, exercise such powers and perform such duties as by law may be incident to seniority. In districts where there may be more than one district judge, if the judges or a majority of them cannot agree upon the appointment of officials of the court, to be appointed by such judges, then the senior judge shall have the power to make such appointments.

Upon the death, resignation, or retirement of any circuit or district judge, so entitled to resign, following the appointment of any additional judge as provided in this section,

the vacancy caused by such death, resignation, or retirement of the said judge so entitled to resign shall not be filled.

Section 13 of the Independent Offices Appropriation Act of June 16, 1933, c. 101, 48 Stat. 283, 307, provides:

> SEC. 13. For the period of the fiscal year ending June 30, 1933, remaining after the date of the enactment of this Act, and during the fiscal year ending June 30, 1934, the retired pay of judges (whose compensation, prior to retirement or resignation, could not, under the Constitution, have been diminished) is reduced by 15 per centum.

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Section 1 of Article III of the Constitution provides:

> SECTION 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

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